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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

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9 JSB, a minor, by his parents and natural
10 guardians MARINA DIAZ and JOSE DIAZ,

11 Plaintiffs,

12 v.

13 CARSON CITY SHERIFF HARRY W.
14 WHEELER,

15 Defendant.
16

Case No. 3:14-cv-0436-LRH-WGC

ORDER

17 Before the court is defendant Carson City Sheriff Deputy Harry W. Wheeler's
18 ("Deputy Wheeler") motion for summary judgment on the issue of qualified immunity.
19 ECF No. 35. Plaintiff JSB, a minor, by and through his parents and natural guardians Marina
20 Diaz and Jose Diaz, filed an opposition (ECF No. 37) to which Deputy Wheeler replied
21 (ECF No. 41).

22 **I. Facts and Procedural History**

23 This case arises out of the arrest of plaintiff JSB, a minor, by defendant Deputy Wheeler.
24 On the afternoon of May 20, 2014, JSB, then a student at Carson Middle School, was walking
25 after school with three other students including two males, JJG and FR, and a female, NG, near
26 West Second Street and South Curry Street in Carson City, Nevada. Non-party Officer Orlando
27 Sanchez ("Officer Sanchez"), an officer with the Carson City School District, was on after-
28 school patrol when he noticed JSB and the other boys "pushing around" NG, who at the time was

1 JSB's girlfriend. Officer Sanchez pulled up next to the students and asked if there was a problem.
2 The male students replied that they were "just fooling around." Not receiving an answer from
3 NG, Officer Sanchez asked her if everything was okay to which she replied yes. Officer Sanchez
4 instructed the students to watch their behavior and then drove to a spot where he could continue
5 to view the students as they walked down the street.

6 As the group of students continued on, Officer Sanchez observed plaintiff JSB grab NG
7 one more time, Officer Sanchez then moved towards the group and radioed the Carson City
8 Sheriff's Office to report that he was going to make contact with a group of students. Officer
9 Sanchez approached the group on foot and again asked the students what was going on. At that
10 point the three boys allegedly started yelling at Officer Sanchez while JSB said "fuck this, let's
11 go" before walking away. Officer Sanchez told the boys that he was calling for back-up to which
12 JSB turned around and replied "bring your backup homie, fuck your back up." Officer Sanchez
13 then radioed the Carson City Sheriffs' Office for officer assistance.

14 Deputy Wheeler and non-party Deputy Rick Encinas arrived on scene within minutes and
15 made contact with Officer Sanchez. Officer Sanchez identified JSB and told Deputy Wheeler
16 that he was the student causing problems. Deputy Wheeler then walked towards JSB and
17 allegedly grabbed a hold of his wrist. JSB pulled away and began twisting, flailing, and spinning
18 around to get out of Deputy Wheeler's grasp. Deputy Wheeler then allegedly lifted JSB off the
19 ground, slammed JSB back to the ground on his stomach, placed his own foot on JSB's back,
20 and then lifted JSB by one leg until he eventually placed JSB in handcuffs. JSB was
21 subsequently placed under arrest for resisting a public officer in the course of his official duties,
22 a violation of Carson City Municipal Code § 8.04.050.¹

23 On August 19, 2014, JSB filed the underlying complaint against Deputy Wheeler alleging
24 two causes of action: (1) a Section 1983 claim for excessive force; and (2) common law assault
25 and battery. ECF No. 1. Thereafter, Deputy Wheeler filed the present motion for summary
26 judgment. ECF No. 35.

27 ¹ Since the time of JSB's arrest, the Nevada Supreme Court struck down Carson City Municipal Code § 8.04.050 as
28 unconstitutionally vague. *See Scott v. First Judicial Dist. Court of Nev.*, 363 P.3d 1159 (2015). As a result of the
Nevada Supreme Court's holding in *Scott*, JSB's juvenile conviction was dismissed.

II. Legal Standard

Summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show “that there is no genuine issue as to any material fact and that the [moving party] is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). In assessing a motion for summary judgment, the evidence, together with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Cnty of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001).

The moving party bears the burden of informing the court of the basis for its motion, along with evidence showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). On those issues for which it bears the burden of proof, the moving party must make a showing that is “sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party.” *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986); *see also Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1141 (C.D. Cal. 2001).

To successfully rebut a motion for summary judgment, the non-moving party must point to facts supported by the record which demonstrate a genuine issue of material fact. *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000). A “material fact” is a fact “that might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Where reasonable minds could differ on the material facts at issue, summary judgment is not appropriate. *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983). A dispute regarding a material fact is considered genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Liberty Lobby*, 477 U.S. at 248. The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient to establish a genuine dispute; there must be evidence on which the jury could reasonably find for the plaintiff. *See id.* at 252.

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1 **III. Discussion**

2 **A. Excessive Force Claim**

3 In his complaint, JSB alleges that Deputy Wheeler engaged in excessive and
 4 unreasonable force when he arrested JSB on the afternoon of May 20, 2014. *See* ECF No. 1. In
 5 the present motion, Deputy Wheeler contends that he is entitled to qualified immunity on JSB's
 6 excessive force claim. *See* ECF No. 35.

7 The doctrine of "[q]ualified immunity balances two important interests – the need to hold
 8 public officials accountable when they exercise power irresponsibly and the need to shield
 9 officials from harassment, distraction, and liability when they perform their duties reasonably."
 10 *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Under this doctrine, it is well established that
 11 "[g]overnment officials performing discretionary functions are generally shielded from liability
 12 for civil damages insofar as their conduct does not violate clearly established statutory or
 13 constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*,
 14 457 U.S. 800, 818 (1982). In contrast to a standard motion for summary judgment, which places
 15 the burden on the moving party to point out the lack of any genuine issue of material fact for
 16 trial, a motion based on a claim for qualified immunity imposes the burden on the plaintiff to
 17 show "both that a constitutional violation occurred and that the constitutional right was clearly
 18 established at the time of the alleged violation." *Green v. Post*, 574 F.3d 1294, 1300 (10th Cir.
 19 2009). However, government officials are not entitled to qualified immunity if there are disputed
 20 issues of material fact that preclude the court from determining defendant's conduct or require
 21 the court to weigh conflicting testimony. *See Sandoval v. Las Vegas Metro. Police Dep't.*, 756
 22 F.3d 1154, 1166 (9th Cir. 2014) (overturning the district court on the basis that the district court
 23 "improperly weighed conflicting evidence with respect to disputed material facts" to justify the
 24 use of force as all of the court's factual conclusions were "based on conflicting testimony, and
 25 drew upon the officers' version of events rather than [plaintiff's] testimony" as is required).

26 A claim that an officer has used excessive force in the course of seizing a person is
 27 analyzed under the Fourth Amendment's objective reasonableness standard articulated in
 28 *Graham. Scott v. Harris*, 550 U.S. 372, 381 (2007). The appropriate test is "whether the officers'

1 actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them,
2 without regard to their underlying intent or motivation.” *Hooper v. County of San Diego*, 629
3 F.3d 1127, 1133 (9th Cir. 2011). To determine if a Fourth Amendment violation has occurred,
4 the court first assesses the gravity of the intrusion by evaluating the type and amount of force
5 inflicted. *Miller v. Clark County*, 340 F.3d 959, 964 (9th Cir. 2003). The court then balances “the
6 extent of the intrusion on the individual’s Fourth Amendment rights against the government’s
7 interests” in order “to determine whether the officer’s conduct was objectively reasonable based
8 on the totality of the circumstances.” *Espinosa v. City & County of San Francisco*, 598 F.3d 528,
9 537 (9th Cir. 2010). To complete this balancing analysis, the court must examine several factors
10 including: (1) the severity of the crime at issue; (2) whether the individual posed an immediate
11 threat to the safety of the officers or others; and (3) whether the individual actively resisted
12 arrest.” *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 931 (9th Cir. 2001).
13 Further, “[t]he reasonableness of a particular use of force must be judged from the perspective of
14 a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Hayes v.*
15 *County of San Diego*, 736 F.3d 1223, 1232 (9th Cir. 2013) (internal punctuation and citations
16 omitted). Thus, “all determinations of unreasonable force . . . must embody allowance for the
17 fact that police officers are often forced to make split-second judgments—in circumstances that
18 are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a
19 particular situation.” *Id.*

20 In this action, Deputy Wheeler argues that JSB cannot establish that the amount of force
21 he used to effectuate JSB’s arrest was excessive under the standard defined in *Graham*. Rather,
22 Deputy Wheeler contends that the amount of force he used was *de minimis* under the
23 circumstances. Specifically, Deputy Wheeler contends that after he showed up to the scene and
24 saw JSB walking away from Officer Sanchez, he moved towards JSB, ordered him to stop, and
25 reached out and took hold of JSB’s wrist. At that point, JSB attempted to pull away and resist
26 Deputy Wheeler’s verbal commands and attempts at physical restraint. Thus, in order to stop JSB
27 from hurting himself, Deputy Wheeler picked him up and pinned him to the ground before
28 placing him in handcuffs. Deputy Wheeler argues that this *de minimis* amount of force was

1 reasonable as the result of a police officer's attempt to restrain a subject who was actively and
2 physically resisting arrest. Thus, Deputy Wheeler contends that he did not violate JSB's clearly
3 established constitutional rights.²

4 However, the court finds that there are disputed issues of material fact related to the
5 actual force Deputy Wheeler used against JSB which precludes granting summary judgment at
6 this time. *See Sandoval*, 756 F.3d at 1166 (holding that government officials are not entitled to
7 qualified immunity if there are disputed issues of material fact that preclude the court from
8 determining the defendant's conduct). In contradiction to Deputy Wheeler's version of events,
9 JSB has proffered deposition testimony and declarations from himself, the other students present
10 at JSB's arrest, and several non-involved third-party witnesses, which, when viewed in the light
11 most favorable to JSB, support his claim that Deputy Wheeler used excessive force. For
12 example, rather than simply place JSB on his stomach, the proffered testimony suggests that
13 Deputy Wheeler lifted JSB high off the ground and then slammed him back to the ground,
14 stunning him, at which point Deputy Wheeler placed his booted foot onto JSB's back and spine,
15 pinning him to the ground before lifting JSB's leg off the ground and stretching his body.
16 Further, when placing JSB in the squad car Deputy Wheeler allegedly slammed JSB into the car
17 before opening the rear door. Moreover, the testimony suggests that Deputy Wheeler did not
18 identify himself or tell JSB to stop before grabbing him from behind. The only undisputed
19 evidence in this action is that Deputy Wheeler is a 6' 2" tall, approximately 240 lb. trained
20 Carson City Sheriff Deputy who has received on the job training in using various levels of force
21 to subdue suspects and effectuate an arrest. In contrast, at the time of the incident JSB was a
22 student at Carson Middle School and was only 4' 11" tall and approximately 100 lbs. All of these
23 facts taken together directly dispute Deputy Wheeler's version of events and the amount of force
24 used on JSB. Although, the court recognizes that Deputy Wheeler challenges all of the evidence
25 proffered in support of JSB's opposition, the court cannot, at this time, weigh the evidence and

26 ² It was well established that at the time of JSB's arrest, an officer could use reasonable *de minimis* force to effectuate
27 the arrest of a suspect who was actively resisting arrest. *See Tatum v. City & County of San Francisco*, 441 F.3d 1090
28 (9th Cir. 2006). Likewise, it was well established at the time of JSB's arrest that an officer could not use unreasonable
force – including body slamming a suspect to the ground or stepping on a suspect's body – against a minor that was
neither resisting arrest nor subject to arrest. *See Davis v. City of Las Vegas*, 478 F.3d 1048 (9th Cir. 2007).

1 testimony presented in this action and must view the evidence in the light most favorable to JSB.
 2 *See Sandoval*, 756 F.3d at 1166. Therefore, the court cannot find as a matter of law that Deputy
 3 Wheeler used only constitutionally reasonable *de minimis* force to effectuate JSB' arrest.
 4 Accordingly, the court shall deny Deputy Wheeler's motion for summary judgment on the issue
 5 of qualified immunity.

6 **B. Assault and Battery**

7 JSB's second claim for relief is for common law assault and battery. In his motion,
 8 Deputy Wheeler argues that he is immune from liability as to this supplemental state tort claim
 9 under the Nevada doctrine of discretionary act immunity.

10 This court has previously recognized that "a law enforcement officer is generally
 11 afforded discretionary-act immunity in conducting an investigation and effectuating an arrest, so
 12 long as the officer does not violate a mandatory directive in doing so." *Sandoval v. Las Vegas*
 13 *Metro. Police Dep't*, 854 F. Supp. 2d 860, 880 (D. Nev. 2012); *see also, Maturi v. Las Vegas*
 14 *Metro. Police Dep't*, 871 P.2d 932 (Nev. 1994) ("As a general matter, under Nevada Revised
 15 Statute (NRS) 41.032 'no action may be brought' against any public officer based upon 'the
 16 failure to exercise or perform a discretionary function . . . whether or not the discretion involved
 17 is abused.'"). In order to extend discretionary-act immunity, a public officer's exercise or
 18 performance of a discretionary function must (1) involve an element of individual judgment or
 19 choice and (2) be based on consideration of social, economic, or political policy. *Boulder City v.*
 20 *Boulder Excavating*, 191 P.3d 1175 (Nev. 2008). In the instant case, the decision to detain and
 21 arrest JSB was a discretionary act as a matter of law. *See Herrera v. Las Vegas Metro. Police*
 22 *Dep't.*, 298 F. Supp. 2d 1043, 1054 (D. Nev. 2004) ("[a] police officer's strategy for approaching
 23 [a suspect], the moment by moment decisions they [make] throughout the interaction, and their
 24 ultimate use of lethal force . . . [are], as a matter of law, discretionary acts"); *see also, Davis v.*
 25 *City of Las Vegas*, 478 F.3d 1048, 1059 (9th Cir. 2007) ("An officer's decision as to how to
 26 accomplish a particular seizure or search is generally considered a discretionary determination
 27 under Nevada law, and officers are therefore immune from suit as to state law claims arising
 28 therefrom in most cases.").

1 However, the Ninth Circuit has held that an officer is not entitled to discretionary act
2 immunity from state law claims where a reasonable juror could find that the officer's conduct
3 constituted a deliberate and willful disregard for the law, or that malicious conduct motivated the
4 officer's animosity toward plaintiff. *Davis v. City of Las Vegas*, 478 F.3d 1048 (9th Cir. 2007).
5 Further, "where an officer's actions are attributable to bad faith, immunity does not apply
6 whether an act is discretionary or not." *Falline v. GNLV Corp.*, 823 P.2d 888 (Nev. 1991).
7 "Thus, where an officer arrests a citizen in an abusive manner not as the result of the exercise or
8 poor judgment as to the force required to make an arrest, but instead because of hostility toward
9 a suspect or a particular class of suspects (such as members of racial minority groups) or because
10 of a willful or deliberate disregard for the rights of a particular citizen or citizens, the officer's
11 actions are the result of bad faith and he is not immune from suit." *Davis*, 823 P.2d at 1060.

12 Here, the court has reviewed the documents and pleadings on file in this matter and finds
13 that Deputy Wheeler is not entitled to discretionary act immunity on JSB's assault and battery
14 claim. As addressed above, JSB has proffered evidence that Deputy Wheeler engaged in
15 excessive force in effectuating JSB's arrest. Viewing the evidence in the light most favorable to
16 JSB, as the court is required on summary judgment, it would be possible for a reasonable jury to
17 conclude that the actions of Deputy Wheeler were done in bad faith or that he deliberately
18 engaged in excessive force when he arrested JSB. As such, plaintiff has submitted evidence
19 which could support a finding that Deputy Wheeler's conduct was motivated by malicious
20 hostility or willful disregard of the law. Therefore, the court shall deny Deputy Wheeler's motion
21 as to this claim.

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1 IT IS THEREFORE ORDERED that defendant's motion for summary judgment
2 (ECF No. 35) is DENIED in accordance with this order.

3 IT IS FURTHERED ordered that the parties shall have sixty (60) days from entry of this
4 order to prepare and submit a joint pre-trial order to the court on all remaining issues in this
5 action.

6 IT IS SO ORDERED.

7 DATED this 30th day of January, 2017.

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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE
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